No. 90939-3
Court of Appeals No. 43937-9-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROMAN M. FEDOROV,

Petitioner.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
and the Superior Court of Pierce County, No. 12-1-00053-2

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WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Roman Fedorov, appellant below, petitions this Court to grant review of a portion of the published decision of the court of appeals designated in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (3), Petitioner asks this Court to review a portion of the published decision of the court of appeals, Division Two, in State v. Fedorov, __ Wn. App. __, ___ P.3d ___ (2014 WL 4792057), originally filed as an unpublished decision on July 29, 2014, and published on the motion of the prosecutor and a third party prosecutor's group on September 23, 2014.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Does the CrR 3.1 right to counsel include the right to consult privately in an attorney-client phone call without having an officer standing in the same room?

2. When an attorney repeatedly asks for privacy to have an attorney-client phone call, is the defendant's CrR 3.1 right to counsel violated when the officer refuses to leave?

3. In State v. Koch, 53 Wn. App. 352, 767 P.2d 143, review denied, 112 Wn.2d 1022 (1989), Division One of the court of appeals upheld admission of a breath test taken after defendants asked for attorneys, were given phone calls to

[1]A copy of the Opinion is submitted herewith as Appendix A (hereinafter "App. A").

attorneys but said they were inhibited by the presence of the officer nearby. The crucial facts for Division One included that the defendants never asked for more privacy for their calls or claimed they were unable to talk about everything as a result. In upholding the admission of the breath test evidence in this case, Division Two affirmed even though the trial court's unchallenged finding was that the attorney had asked the trooper to give his client more privacy twice but the trooper refused to leave the room because of the police station layout.

Should review be granted based upon the apparent conflict between these two decisions?

D. STATEMENT OF THE CASE

a. Procedural facts

In 2012, petitioner Roman Fedorov was charged with and convicted after jury trial in Pierce County of driving while under the influence of intoxicants and attempting to elude a pursuing police vehicle, alleged with an "endangerment" enhancement. CP 1-2, 93-98, 114-19.[2] He was ordered to serve a standard range sentence and he appealed. 4RP 334-35; CP 120.

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[2]The verbatim report of proceedings consists of 9 volumes, some of which are chronologically paginated. The volumes will be referred to as follows:
proceedings of February 16, April 3, 17 and 26, May 23 and 24, 2012, as "1RP;"
May 29, 2012, as "2RP;"
May 30, 2012, as "3RP;"
the four chronologically paginated volumes containing the proceedings of July 30 and 31, August 1, 2 (morning) and 31 and September 14, 2012, as "4RP;"
the separately paginated proceedings of the afternoon of August 2, 2012, as "5RP;"
August 6, 2012, as "6RP."

On July 29, 2014, Division Two of the court of appeals affirmed in an unpublished opinion. App. A. Motions to publish were granted September 23, 2014. App. A at 1-2. This Petition follows.

b. Overview of facts regarding incident

Fedorov was accused of being the driver of a car which was stopped by police after it was seen traveling at 119 miles an hour on the freeway. 4RP 152-59. When the car ultimately stopped and Fedorov got out, an officer suspected that he was intoxicated. 4RP 237, 171. Instead of conducting field sobriety tests, the officer took Fedorov to the Fife Police Department to use their breath test machine. 4RP 175.

Ultimately, Fedorov agreed to a breath test and the two samples indicated ".096" and ".095", above the legal limit for alcohol. 4RP 320. Fedorov and another man who was with him said it was the other man who had been driving that night but that man had panicked and jumped out the passenger side while Fedorov got out on the driver's side. 6RP 12-13, 25, 48.

c. Facts relevant to issues presented for review

Before trial, Fedorov moved to suppress the results of the breath tests, arguing that his rights to counsel under CrR 3.1 were violated. At the suppression hearing Trooper Durbin, who conducted the test, testified

about taking Fedorov to the Fife Police Department to use their test machine or "BAC." 4RP 20. The room was only "29 paces by. . .17 paces" in size and had a "little seating area," a little "work space," a washing machine and a rack of clothing. 4RP 22-26. Fedorov was handcuffed to a metal chair, next to the desk where the officer sat. 4RP 23-25.

After Durbin began the 15-minute "observation" and processing for the DUI, he advised Fedorov of his "implied consent" rights. 4RP 28. Fedorov asked to speak to an attorney, so the officer called the "after-hours pager" for the Department of Assigned Counsel (DAC), the local public defender. 4RP 28. When the attorney called back, he and the officer spoke, with the attorney asking questions like the name of the suspect, the alleged crime, whether any field sobriety tests were done, whether the suspect will be booked and whether or not they are cooperative. 4RP 28-29.

At that point, the officer's practice in this situation is to give the phone to the arrested person or would put the phone on "speaker" if that was "the only option." 4RP 29. Durbin said he would then "give them as much privacy as I can." 4RP 29. The trooper admitted that this just meant he would "go to the other side of the room." 4RP 29.

Durbin denied recalling whether Fedorov "requested additional privacy" himself during the call, said he did not remember hearing any of the conversation and that Fedorov would have to be "speaking pretty loud" for the officer to hear. 4RP 29-30. Durbin thought he was standing "back over by the washing machine" and writing on paperwork during the call. 4RP 36.

Durbin admitted that he had used this room before and that some of the other nearby facilities which had been available to him had "BAC rooms" with doors that had small windows on them so an officer could keep an eye on a suspect without having to be in the same room while they spoke to counsel. 4RP 25, 33. At this particular facility, Durbin said, he would never leave the room if he was watching a suspect, because it was "understood when you come to the Fife jail, you're responsible for your subject[.]" 4RP 30-31.

Nicholas Andrews, the DAC attorney on call that night, testified about speaking to the trooper in order to get preliminary information, then advising the officer not to ask Mr. Fedorov any more questions or perform any more tests. 4RP 43. He also specifically asked the trooper for "complete privacy" for his client to speak to him on the phone, but the trooper refused. 4RP 42-43. He said, "I can't give you privacy, you know,

because of where we're at, generally," meaning the Fife police stateion 4RP 43.

This was not the first time an officer had made this claim to Andrews about the same police station. 4RP 44.

Andrews made two requests for privacy. 4RP 45. Each time, the trooper refused the attorney's request to leave the room and allow Fedorov to speak freely. 4RP 45. As a result, Andrews specifically wrote on his report form for the phone call that "[t]he officer is present. Stayed in the room." 4RP 45. Despite the circumstances, Andrews tried to gather as much information as he could "without having him answer in a verbal manner which could in fact incriminate himself or give the officer any information that may be detrimental for him." 4RP 45. The attorney also said he told his client "I don't want you to answer anything out loud unless I specifically request" because he did not want Fedorov to accidentally give the officer any information. 4RP 46. Andrews also told his client to answer questions only with a "yes or no" for that very same reason. 4RP 46.

At that point, Andrews said, he usually tells a defendant their rights regarding testing and usually discusses whether or not the client wants to take the test. 4RP 46. The point is for the attorney to try to be able to

advise his client based on the facts, so Andrews would try to get answers to some yes or no questions without compromising his client's rights further. 4RP 46-50. Andrews stated that he was not able to ask questions which were "fairly important" in order to be able to properly advise his client. 4RP 47. For example, he could not ask how much Fedorov had consumed, a question which was important because the attorney believed that PBT's usually "run high" and, if the PBT had a low amount, the defendant might well be under the legal limit and thus want to take a test. 4RP 47-60.

The attorney was clear that his "calculation of whether or not they are over/under the limit" would change what legal advice he would give a client about taking the breath test. 4RP 47. If he thought someone was likely to "blow under the limit," he would recommend that they take the test. 4RP 47. If he thought the person was likely to "blow over," he would recommend that further testing would be refused. 4RP 47. Andrews said, "[i]f you saw how many cases where a person blew over on a PBT and you never charged it because it was under, you would be shocked." 4RP 59.

With Fedorov, Andrews was able to ask a few questions, such as whether Fedorov had a suspended license, whether he was in a deferred

prosecution, whether he had a commercial driver's license and whether he had prior DUI convictions. 4RP 57-67. The attorney was able to glean some information from the officer, such as the offense, that the PBT indicated results of .107 and whether Fedorov was going to be booked. 4RP 59-61.

Due to not having privacy to converse with his client freely, however, Andrews could not gather all the information he needed to give Fedorov his advice on that decision. 4RP 48. Instead, the attorney was limited in how he could help, because not having the privacy to ask the questions and not being able to get the information made him unable to "make a completely accurate decision" about what to advise his client to do. 4RP 48.

On his report, the attorney noted, there were a series of questions he was supposed to ask but had to write down, "[c]ould not ask due to no privacy." 4RP 71. The attorney also indicated "could not discuss consumption due to privacy." 4RP 74. Andrews was frank in his opinion that the lack of privacy that occurred in this case affected his ability to give full and complete legal advice to Fedorov and that, as a result, Fedorov was "not being given attorney/client privilege." 4RP 48. While the attorney was able to give some advice on the consequences of refusal to

submit to breath or blood tests in general, his ability to give his client adequate advice was hampered by the lack of privacy. 4RP 67, 70.

Fedorov testified that he personally asked the officer to give him privacy after the attorney asked where the officer was standing. 4RP 87. Fedorov felt that the officer could hear what Fedorov was saying in the quiet room, and did not feel free to ask detailed questions of his attorney during the conversation. 4RP 89.

In its oral ruling, the court noted that the trooper did not recall if there was a "request for privacy," in contrast to Andrews' testimony, which was clear. 4RP 109. The court noted that the attorney had requested privacy twice and that the trooper refused and stayed in the room. 4RP 109. The court concluded that the officer had not provided sufficient privacy for Fedorov to have attorney/client communication. 4RP 109. The court found, however, that Fedorov had not shown "actual prejudice" because there was evidence that Fedorov was "free to ask questions" and that Fedorov had ultimately decided to take the breath test. 4RP 109.

The written findings of the court include a finding that the attorney specifically requested privacy twice, that the trooper said he could not do that in this particular police station because of the layout and had to stay in

the room, that the attorney was not able to ask a number of specific questions of his client because of the situation and that he might have been able to figure out how to ask those questions with "yes or no" answers but it was not feasible "within the allotted time. CP 116-17. The court specifically found that "there was a request for privacy in this case and as a result, there was insufficient privacy afforded to the defendant during his phone call." CP 117. The court concluded, however, that Fedorov had not proved "actual prejudice" as a result of "the lack of privacy." CP 117-18.

On appeal, at the prosecution's behest, Division Two held that the trial court had erred in its "determination that the police officer violated the rule-based right to counsel by not allowing Fedorov to speak in private to his counsel." App A at 2, 6. The court first found that the trial court's finding that the trooper had "afforded insufficient privacy" to the attorney-client communication was not a finding of fact but a conclusion of law, so it applied de novo review. App. A at 7. The court then noted that the rule-based right to counsel may be "fulfilled by telephone consultation alone," after which it found that the CrR 3.1 right to counsel was not violated because although the attorney asked for complete privacy twice, the trooper said that he would have gone to the other side of the room if there was such a request and said he could not have heard the conversation from

there. App. A at 8. Division Two then accepted "as a verity Trooper Durbin's testimony" that he did not hear the conversation. App. A at 8-9.

Because the trooper did not actually hear the conversation, Division Two concluded, "we hold that he did not violate Fedorov's right to counsel." App. A at 9. In a footnote, the court also rejected the idea that the right to counsel "entails the right to confer with counsel in private" when the right is rule-based. App. A at n. 4.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(3), BECAUSE THE ISSUES WERE DECIDED AS A MATTER OF FIRST IMPRESSION BY THE COURT OF APPEALS AND ARE OF SUCH SUBSTANTIAL PUBLIC IMPORT THAT THEY SHOULD BE DECIDED BY THIS COURT

CrR 3.1(b)(1) provides that "[t]he right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody." This Court has held that the right to counsel under this language accrues when the defendant is arrested for DUI and faces the decision whether to take a breath test. See, e.g., Spokane v. Kruger, 116 Wn.2d 135, 803 P.2d 305 (1991). In such a situation, if the defendant unequivocally asks for a lawyer, the police are "obliged" under CrR 3.1 "to make all reasonable efforts to put that person in contact with a lawyer at the earliest

opportunity," and must provide not only access to a phone but names and phone numbers of attorneys and "any other means necessary to put the person in communication with a lawyer." See State v. Pierce, 169 Wn. App. 533, 537, 388 P.3d 158 (2012); CrR 3.1(c)(2). A violation of the rule-based right to counsel compels suppression of any evidence tainted by that error. State v. Copeland, 130 Wn.2d 244, 282, 922 P.2d 1304 (1996).

The issues on review in this case revolve around the scope of the CrR 3.1(b) right to counsel. More specifically, this Court is being asked to grant review to rule on whether, in its published decision, the court of appeals erred in holding as matters of first impression 1) that the CrR 3.1 right to counsel does not include the right to confer privately with that counsel and 2) that an officer does not have to honor requests for more privacy or leave a small room in which the defendant is making the attorney-client phone call as part of the defendant's CrR 3.1(b) right.

This Court should grant review to address those issues under RAP 13.4(b)(3) in order to give full effect to CrR 3.1. This Court has recognized that the rule "goes beyond the constitutional requirements" of the Fifth and Sixth Amendments in providing counsel. State v. Templeton, 148 Wn.2d 193, 218, 59 P.3d 632 (2002). While not coequal with those constitutional rights, this Court has also noted that the rule-

based right to counsel is extremely important for the defense. 148 Wn.2d at 212.

Before Division Two's publication of the decision in this case, there was no case holding that the rule-based right to counsel does not include the right to confer with counsel in private. Nor was there any precedent holding that a police officer may remain in the same room during an attorney-client phone call under the rule even if specifically asked by counsel to leave.

Now, however, this case establishes those precedents and effectively eviscerates the CrR 3.1(b) right to counsel. In Koch, supra, the court interpreted essentially the same language in the limited jurisdiction rule and found that the rule-based right was not violated when officers were in the room. 53 Wn. App. at 353-54. That holding, however, depended not only on the officers' testimony that they could not hear or understand what was said but the pivotal fact that neither the defendants nor their attorneys asked for more privacy despite later claims there was not enough. 53 Wn. App. at 353-54. In this case, however, Division Two has now held that such requests for privacy are irrelevant and it is proper for an officer to be within earshot of an attorney-client phone call, because the right to counsel under CrR 3.1(b) does not include the right to private

communication with counsel and the officer did not recall hearing anything. App. A at 8.

Thus, Division Two's decision appears to conflict with Koch as to whether requests by counsel or the defendant for further privacy are to be given any consideration by the court (and, ultimately, the police) at all.[3] In addition, the court's decision wrongly ignores the purposes of the rule-based right to counsel which have been recognized by this Court. In Templeton, this Court held that the rule-based right to counsel

> is essential to the effective preparation of defense against the charge of DUI. This means that while in custody a suspect must be advised of the right to counsel and provide access to counsel in order that the suspect may determine whether to submit to the BAC breath test, arrange for alternative testing, and present other exculpatory evidence.

148 Wn.2d at 212. The right is intended to allow a defendant to consult with his attorney in making important decisions that affect his legal rights. Under the published decision in this case, he must now have that "essential" consultation with his attorney on the phone with an officer in the room, even if his attorney asks the officer to give more privacy.

Division Two's conclusion that the right to counsel does not include the right to confer privately with counsel thus forces a suspect to

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[3]This apparent conflict also supports granting review as discussed, *infra*.

attempt to engage in a conversation about his legal rights and remedies with an officer in the room, apparently trusting to hope that the officer cannot hear.

This is not a Sixth Amendment case. But in the Sixth Amendment context, this Court has held that the right to counsel "includes the right to confer privately with that counsel[.]" State v. Fuentes, 179 Wn.2d 808, 811, 318 P.3d 257 (2014). Indeed, in Fuentes, this Court found the right to privately speak with counsel so important that an officer's eavesdropping on those communication is an "odious practice" and "shocking and unpardonable conduct." Fuentes, 179 Wn.2d at 811 (quotations omitted). This recent case illustrates that giving officers access to means to listen to attorney-client conversations and trusting that this access will not be used is not a way to honor any right, even a lesser rule-based right. Further, Division Two does not explain why the ability to communicate privately with counsel about your legal rights and responsibilities is any less important when the right to that communication is rule-based, rather than constitutionally based. App. A at 8-9. In both situations, the need for the ability to speak freely, to ask questions, to discuss issues, to relate potentially incriminating facts - in short, to have a real consultation with your lawyer - are the same. The dynamic of the need to be free to

communicate is the same.

This Court should grant review. The Court has found the issue of the scope of the rule-based right to counsel significant enough to address on review before. See Templeton, 148 Wn.2d at 212-13; Copeland, 130 Wn.2d at 282. Further, the motions of opposing counsel and the third-party prosecutor's organization, the Washington Association of Prosecuting Attorneys ("WAPA") urging DivisionTwo to publish this case establish that the decision is of great significance and will have a serious impact throughout the state. In its motion to publish, opposing counsel averred that there is a "a significant amount of ambiguity and confusion" at the trial court level that "recurs frequently" on these issues. Motion at 2-3. He is apparently not the only prosecutor in the Pierce County prosecutor's office to have this opinion, as he notes that he "was contacted spontaneously by supervisors in juvenile and misdemeanor divisions" of that office asking the case to be made precedential by publishing for use in lower courts. Motion at 3.

The prosecution's motion also supports Petitioner's position that this Court should grant review by pointing to the lack of "clear controlling authority" on the issue. Motion at 4. The prosecution argued that the court of appeals should publish the decision in this case and thus create

precedent because doing so would "provide clear, helpful guidance in a large number of cases at the trial court level." Motion at 4. Indeed, the prosecution cited statistics of nearly 32,000 DUI cases which are usually handled through the courts of limited jurisdiction, which the prosecution said resulted in "a limited amount of case law guidance relative to the volume of DUI cases in the trial courts." Motion at 4.

The WAPA motion to publish similarly supports Mr. Fedorov's position on the public importance and potential state-wide impact of the decision in this case, indicating that these issues "arise with some frequency in courts of limited jurisdiction." WAPA Motion at 1-2. The association of prosecutors also cited multiple prosecutors offices from all over the state who all "urge[d] publication" of Division Two's decision in this case, some of them referring to pending cases where the same issues occur. WAPA Motion at 2.

These declarations in these motions clearly show the decision in this case is expected to have incredibly far-reaching effects. This Court should grant review in order to determine the scope of the CrR 3.1(b) right to counsel in light of the issues in this case.

2. REVIEW SHOULD ALSO BE GRANTED UNDER RAP 13.4(b)(2) BECAUSE THE DECISION APPEARS TO CONFLICT WITH KOCH

Review should also be granted under RAP 13.4(b)(2), based on the apparent conflict between the decision in this published case and of Division One in Koch. In Koch, Division One asked, inter alia, whether the right to counsel under the CrRLJ 3.1(c)(3) is denied when there is a police officer present in the room and that presence "arguably limits privacy during a telephone conversation with counsel." 53 Wn. App. at 353. In both cases in that consolidated appeal, the Court found that the defendant's rule-based rights at the stage immediately after arrest "are limited," so that "often telephone consultation alone will be sufficient." 53 Wn. App. at 357. The Court then concluded:

> Since the right to counsel at this stage of a DWI investigation is a limited one, we conclude that **the fact that neither Hanson nor Koch made a specific request for additional privacy is significant**. This fact alone would be sufficient to distinguish their cases from one upon which they [the two defendants] both rely, State v. Holland, 147 Ariz. 453, 711 P.2d 592 (1985), wherein the officer refused to comply with a direct request from counsel that he leave the room during the defendant's phone conversation so that the consultation could be confidential.

Koch, 53 Wn. App. at 357-58 (emphasis added). Another fact that was significant for the Koch Court was that in the Arizona case, the defendant

had said the denial of his request prevented him from properly advising the defendant on "how to proceed," but neither defendant in the Koch case nor their attorneys had made such a declaration. Koch, 53 Wn. App. at 357-58.

Here, the published decision appears to be in conflict with Koch. In this case, both counsel and the defendant talked about asking for more privacy. Federov's counsel specifically testified that he was unable to ask crucial questions such as what his client had consumed, etc., which would have potentially changed counsel's advice about taking the test. 4RP 42-43. Andrews stated that he was not able to ask questions which were "fairly important" in order to be able to properly advise his client. 4RP 47. The attorney was clear that his "calculation of whether or not they are over/under the limit" was affected by this inability to ask questions which could change what legal advice he would give them about giving the breath test. 4RP 47. Due to not having privacy to converse with his client freely, however, Andrews said, he could not gather all the information he needed to give Federov his advice on that decision. 4RP 48.

Federov himself testified that he did not feel free to ask detailed questions of his attorney during the conversation, because of the lack of privacy. 4RP 89. The decision in this case thus appears to be in conflict

with Koch, because that case affirmed largely because of the *absence* of those same facts. This Court should grant review based on RAP 13.4(b)(2) as well as RAP 13.4(b)(3).

F. CONCLUSION

The trial court correctly concluded that Federov's right to speak freely with his attorney was violated by the officer's refusal to give Federov privacy to speak with his attorney on the phone. The court of appeals erred in holding otherwise, in finding there was no right to private consultation with counsel and in holding that an officer need not honor requests for further privacy and may remain physically nearby, even in the same room. This Court should grant review, reverse the court of appeals, hold that the breath test evidence should have been suppressed and reverse the convictions in this case.

DATED this 23rd day of October, 2014.
Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel via the upload portal at the Court of Appeals, Division Two, at their official service address, pcpatcecf@co.pierce.wa.us, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows: Roman Fedorov, DOC 791256, 1550 - 4th Ave S., Seattle, WA. 98134-1510.

DATED this 23rd day of October, 2014.

/s Kathryn Russell Selk
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROMAN MIKHAILOVICH FEDOROV, Appellant.	No. 43937-9-II ORDER PUBLISHING OPINION

RESPONDENT, and third party Washington Association of Prosecuting Attorneys, have moved to publish the opinion filed on July 29, 2014. The Court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED, that the motion to publish is granted and the opinion's final paragraph reading:

> A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED that this opinion will be published.

DATED this 23RD day of SEPTEMBER, 2014.

Worswick, J.

Johanson, C.J.

Melnick, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROMAN MIKHAILOVICH FEDOROV, Appellant.	No. 43937-9-II UNPUBLISHED OPINION

WORSWICK, J. — A jury found Roman Fedorov guilty of attempting to elude a pursuing police vehicle and driving under the influence of intoxicants. Fedorov appeals, arguing that the trial court committed three evidentiary errors: (1) admitting a video containing irrelevant and prejudicial evidence of two pocket knives found during the arrest, (2) refusing to suppress results of a breath-alcohol test due to a police officer's invasion of Fedorov's privacy while conferring with an attorney, and (3) allowing a forensic expert to testify to work performed by another technician in violation of Fedorov's right to confront the witnesses against him. In its response brief, the State assigns error to the trial court's determination that the police officer violated the rule-based right to counsel by not allowing Fedorov to speak in private to his counsel. Because Fedorov's right to counsel was not violated, and because the trial court did not err in admitting evidence and testimony, we affirm.

FACTS

In January 2012, Roman Fedorov and Benjamin Gaidaichuk drove together from Stevens Pass to Tacoma. As they traveled southbound on Interstate 5 near Fife, Trooper Ryan Durbin measured their car's speed at 119 miles per hour.

Trooper Durbin activated his siren and began pursuing the car, which continued at a very high rate of speed. The car switched from the HOV lane on the interstate's left side to the right shoulder, where it continued passing cars in traffic. The car then exited the interstate, traveled the wrong way for a short distance on Pacific Avenue, and finally stopped after reaching a dead-end in a parking lot. When the car stopped, Gaidaichuk immediately exited from the passenger's door and Fedorov emerged relatively slowly from the driver's side. Arriving at this moment, Trooper Durbin arrested both men at gunpoint.

Noting that Fedorov smelled of alcohol, Trooper Durbin transported him to the Fife police department, which was the closest facility with breath-alcohol testing equipment located in a "BAC room." Clerk's Papers (CP) at 114. Fedorov agreed to take a breath test, and Trooper Durbin began the 15-minute observation period. *See* RCW 46.61.506(4)(a). Fedorov then asked to speak with an attorney.

Trooper Durbin called the Department of Assigned Counsel, and Fedorov spoke by phone to attorney Nicholas Andrews with Trooper Durbin present. Andrews twice requested "complete privacy," but Trooper Durbin did not leave the BAC room because he could not observe Fedorov from outside the room. CP at 115. Trooper Durbin later testified that he would walk to the other side of the room when requests for privacy were made, and an arrestee "would have to be speaking pretty loud for me to be able to hear." Verbatim Report of Proceedings

(VRP) at 30. But Fedorov testified he felt that Trooper Durbin could hear his statements to Andrews. The room measured 27 feet by 19 feet.

With Trooper Durbin still present, Fedorov consulted with Andrews. Andrews learned from Fedorov that he did not have a commercial driver's license or any DUI charges within the previous 7 years. Andrews advised Fedorov of his right to refuse a breath test, as well as the administrative and criminal consequences of refusal. Fedorov was "free to ask questions," but because of Trooper Durbin's presence, Andrews felt unable to ask open-ended questions about Fedorov's drinking before the arrest. CP at 115.

After speaking with Andrews for 13 minutes, Fedorov again agreed to take the breath test. Fedorov's breath test results showed an alcohol concentration of .096 and .095.

The State charged Fedorov with two counts: attempting to elude a pursuing police vehicle and driving under the influence of intoxicants. The case proceeded to a jury trial.

Before trial Fedorov moved to suppress the results of the breath test, arguing that the lack of privacy violated his right to counsel. The trial court agreed that Fedorov's right to privately confer with his attorney was invaded, but declined to suppress the evidence because the violation did not prejudice Fedorov. The trial court entered findings of fact and conclusions of law supporting its decision.

During the trial, the trial court admitted a 6-minute video taken from the dashboard camera in Trooper Durbin's car. The video showed Trooper Durbin's pursuit of Fedorov's car, his arrest of Fedorov and Gaidaichuk, and his search of Fedorov incident to the arrest. Fedorov objected to the portion of the video clip after the 3-minute, 50-second mark, consisting of the search incident to the arrest, on the ground that it was irrelevant and greatly prejudicial. Fedorov

claimed that the challenged portion of the video showed Trooper Durbin removing a pocket knife from Fedorov's jacket. But the trial court overruled the objection, accepting the State's argument that the challenged portion showed whether Fedorov was able to follow instructions; thus, any prejudice was outweighed by the probative value of evidence relevant to the issue of Fedorov's intoxication.

While the video was being published to the jury, the State asked Trooper Durbin to explain what the video showed. When the video showed the search incident to Fedorov's arrest, Trooper Durbin testified, "[Fedorov] was pulling away from me. I was going into his pocket, which is where the pocket knives are." 3 VRP at 178. In addition, before the video was published, Trooper Durbin testified that he removed two pocket knives from Fedorov's pocket. Fedorov did not object to any of this testimony.

The State also elicited Trooper Durbin's testimony about his experience performing breath tests. Trooper Durbin testified to the procedures he followed when testing Fedorov's breath sample.

Further, the State elicited expert testimony from Trooper Albert Havenner, a certified breath-alcohol technician. Trooper Havenner was also the custodian of records of quality assurance procedures performed annually "[t]o ensure the [breath-alcohol testing machine] is working accurately and properly." 4 VRP at 310.

Trooper Havenner testified that, according to calibration records, the particular machine used to test Fedorov's breath had performed satisfactorily during a quality assurance procedure in September 2011. But Trooper Havenner did not personally put the machine through the quality assurance procedure; that was done by Trooper Denny Stumph. The State did not call

Trooper Stumph to testify at Fedorov's trial because the Washington State Patrol had transferred him to King County.

Trooper Havenner further testified that, according to maintenance records, Trooper Stumph had replaced the machine's simulator solution in November 2011 with a solution prepared by the State toxicologist. Trooper Havenner opined that, assuming the records of the quality assurance procedure and simulator solution replacement were true, the machine that tested Fedorov's breath would have yielded "accurate and reliable" results. 4 VRP at 320.

Fedorov objected to Trooper Havenner's testimony, asserting that it violated the confrontation clause[1] because he was not the person who performed the maintenance on the machine that tested Fedorov's breath. The trial court overruled the objection.

The jury found Fedorov guilty of both counts. Fedorov appeals.

ANALYSIS

I. EVIDENTIARY ERROR

Fedorov first argues that his convictions should be vacated because the trial court erroneously admitted a portion of the video showing that Fedorov possessed two pocket knives. We disagree.

We review evidentiary rulings for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Darden*, 145 Wn.2d at 619. A trial court necessarily abuses its discretion when basing its ruling on an error of law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

[1] U.S. CONST. amend. VI.

Fedorov argues that the challenged portion of the video was irrelevant, unfairly prejudicial, and improper propensity evidence. *See* ER 402, 403, 404. Fedorov appears to base his argument solely on his assertion that the video showed the removal of two pocket knives from his pocket.

But contrary to Fedorov's assertion, the video merely shows that at two different times Trooper Durbin removed objects from Fedorov's pockets and placed them on top of Fedorov's car. From the video alone, it is impossible to identify these objects as pocket knives. For that reason, Fedorov fails to show that the trial court abused its discretion by admitting the entire six-minute video. *See Darden*, 145 Wn.2d at 619.

To the extent that Fedorov means to challenge Trooper Durbin's identification of the objects as pocket knives, Fedorov waived this challenge by failing to object to Trooper Durbin's testimony. *See* ER 103(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Fedorov's first argument fails.

II. RULE-BASED RIGHT TO COUNSEL

Fedorov next argues that the trial court erred by failing to suppress the results of his breath test after finding a violation of his rule-based right to speak in private with counsel. The State disputes this argument and also, as a threshold issue, assigns error to the trial court's determination that Fedorov's right to counsel was violated. We agree with the State that Fedorov's right to counsel was not violated. Thus, we affirm on different grounds the trial court's denial of Fedorov's motion to suppress.

As a threshold issue, the State argues that the trial court erroneously determined that Trooper Durbin violated Fedorov's right to counsel by invading his privacy during the phone call.[2] We agree.

We review findings of fact and conclusions of law not as they are labeled, but for what they truly are. *State v. Luther*, 157 Wn.2d 63, 78, 134 P.3d 205 (2006). The State has assigned error to the trial court's "finding[] as to disputed facts" that Trooper Durbin afforded insufficient privacy to Fedorov during his phone call with Andrews. CP at 117. But the State clearly challenges only the embedded conclusion of law that Fedorov's privacy was invaded. Thus, we review de novo the trial court's legal conclusion that Federov's privacy was invaded. *See State v. Smith*, 154 Wn. App. 695, 699, 226 P.3d 195 (2010). Because neither party challenges the remaining findings of fact, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Under CrR 3.1(b)(1), a defendant's right to counsel attaches "as soon as feasible after the defendant is taken into custody."[3] When a defendant in custody seeks legal advice, he must have an opportunity to call appointed counsel. *State v. Fitzsimmons*, 93 Wn.2d 436, 441, 610 P.2d 893, *vacated*, 101 S. Ct. 390, *and reaffirmed without amendments*, 94 Wn.2d 858 (1980), *overruled on other grounds by City of Spokane v. Kruger*, 116 Wn.2d 135, 147, 803 P.2d 305

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[2] The trial court concluded that "there was insufficient privacy afforded to [Fedorov] during his phone call with Mr. Andrews," without identifying a more specific privacy right. CP at 117.

[3] The language of CrR 3.1(b)(1) is equivalent to that of CrRLJ 3.1(b)(1). These rule-based rights to counsel attach before the defendant has a Sixth Amendment right to counsel. *See City of Spokane v. Kruger*, 116 Wn.2d 135, 139 n.6, 803 P.2d 305 (1991) (considering equivalent language in former JCrR 2.11(b)(1) (rescinded)).

(1991). But the rule-based right to counsel at this stage is limited. *City of Seattle v. Koch*, 53 Wn. App. 352, 357, 767 P.2d 143 (1989) (citing *Fitzsimmons*, 93 Wn.2d at 448).[4]

Often the rule-based right to counsel is fulfilled by telephone consultation alone. *Koch*, 53 Wn. App. at 357. When a police officer is present in a room while a defendant speaks with counsel by telephone, the defendant's rule-based right to counsel is not necessarily violated. *See Koch*, 53 Wn. App. at 353-55, 357-58. Instead, whether the rule-based right to counsel was violated depends on the facts and circumstances of each case. *City of Bellevue v. Ohlson*, 60 Wn. App. 485, 489, 803 P.2d 1346 (1991).

Here, the trial court's findings of fact establish that Fedorov's right to counsel was not violated. The trial court found that (1) Andrews twice requested "complete privacy" on Fedorov's behalf, although Trooper Durbin could not recall the requests; (2) Trooper Durbin testified that if a request for privacy were made, he would have gone to the other side of the BAC room; and (3) Trooper Durbin testified that he could not have heard Fedorov's conversation from the other side of the BAC room. Given the trial court's additional finding that Trooper Durbin was credible, we accept as a verity Trooper Durbin's testimony that he did not hear Fedorov's

[4] Citing *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963), and *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000), Fedorov asserts that the right to counsel entails the right to confer with counsel in private. But both of these cases considered a defendant's *constitutional* right to counsel. *Cory*, 62 Wn.2d at 373; *Garza*, 99 Wn. App. at 296. In contrast, the present case involves only the rule-based right to counsel under CrR 3.1(b)(1), and we recognize that this rule-based right to counsel is "limited." *Koch*, 53 Wn. App. at 357. For example, the rule-based right to counsel does not include the right to have an attorney present when a breath test occurs, and it does not require that the defendant speak with his attorney of choice. *City of Bellevue v. Ohlson*, 60 Wn. App. 485, 489, 803 P.2d 1346 (1991); *City of Seattle v. Sandholm*, 65 Wn. App. 747, 751, 829 P.2d 1133 (1992).

conversation with counsel. Because Trooper Durbin did not hear Federov's conversation, we hold that he did not violate Fedorov's right to counsel.

Because Fedorov's right to counsel was not violated, we do not reach Fedorov's argument that he was prejudiced by the violation. The trial court did not err by denying Fedorov's motion to suppress his breath test results.

III. CONFRONTATION CLAUSE

Lastly, Fedorov argues that his right to confront the witnesses against him was violated by the absence of any testimony from Trooper Stumph, who maintained the machine that was eventually used to measure the alcohol in Fedorov's breath. We disagree because Trooper Stumph's maintenance records were not testimonial statements.

A. *Confrontation Right*

A criminal defendant has a constitutional right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. Therefore in a criminal trial, the State cannot introduce a testimonial statement from a nontestifying witness unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In considering whether the confrontation clause was violated, our review is de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The confrontation clause applies only to witnesses who make testimonial statements. *Crawford*, 541 U.S. at 68. A typical testimonial statement is a solemn declaration intended to establish some fact. *Crawford*, 541 U.S. at 51.

Further, a statement is testimonial when its primary purpose is to establish facts relevant to a criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). But a statement is not testimonial when its primary purpose is to enable police to respond to an emergency. *Davis*, 547 U.S. at 822.

A statement's primary purpose depends on an objective evaluation of the circumstances in which it is made. *Davis*, 547 U.S. at 822. Thus, a forensic analyst's affidavit that a substance tested positive as cocaine is plainly a testimonial statement when the circumstances show it was made to establish that fact at trial. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

Likewise, a technician's unsworn report on the results of a blood-alcohol analysis is a testimonial statement when prepared to establish a defendant's intoxication at trial. *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705, 2710-11, 2717, 180 L. Ed. 2d 610 (2011). In *Bullcoming*, the Court emphasized that questioning of the State's "surrogate" witness—another technician who testified to the practices at the laboratory where the testing took place—could not have exposed lapses or lies on the part of the technician who actually performed the analysis at issue. *Bullcoming*, 131 S. Ct. at 2715-16.

Contending that the confrontation clause was violated, Fedorov argues that Trooper Havenner acted as a surrogate for Trooper Stumph, who was a witness against Fedorov because his calibration report and simulator solution record were testimonial statements. We disagree.

Trooper Stumph's calibration report and simulator solution record were not testimonial statements. They were not made to establish facts at Fedorov's trial. Instead, the calibration report served as a record that the machine correctly computed figures and printed them out during annual quality assurance procedures performed in September 2011. This testing occurred months before the night in January 2012 when Fedorov was arrested. Likewise, the simulator solution record showed that the simulator solution used in this machine had been replaced in November 2011. The objective circumstances show the calibration report and simulator solution record were not originally made to establish facts at Fedorov's trial.

This conclusion is further supported by the rule recently announced by our Supreme Court to resolve confrontation clause challenges to expert witness testimony relying on statements made by a declarant. *State v. Lui*, 179 Wn.2d 457, 315 P.3d 493, *cert. denied*, No. 13-9561 (2014).[5] "If the declarant makes a factual statement to the tribunal, then he or she is a witness. If the witness's statements help to identify or inculpate the defendant, then the witness is a 'witness against' the defendant." *Lui*, 179 Wn.2d at 482. Here, Trooper Stumph was not a witness against Fedorov because his records did not identify or inculpate Fedorov. *See Lui*, 179 Wn.2d at 486. Because Fedorov's confrontation right was not violated, this argument fails.[6]

[5] Our Supreme Court decided *Lui* after the parties briefed this case. Fedorov relies on Division One's decision, which the Supreme Court affirmed. *See Lui*, 179 Wn.2d at 463.

[6] Because we find no error, we do not apply the constitutional harmless error standard. *See Lui*, 179 Wn.2d at 495. But we note that RCW 46.61.506(4)(a) provides that breath test evidence "shall be admissible" when the State meets eight foundational requirements, none of which were established by Trooper Stumph's records.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Johanson, C.J.

Melnick, J.

RUSSELL SELK LAW OFFICES

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